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Supreme Court of the United States

October Term, 1978

No. 78-789

JIMMY LEE CLARK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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Supreme Court of the United States

October Term, 1978

No. .....

JIMMY LEE CLARK,
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vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioner, Jimmy Lee Clark, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in this proceeding on August 16, 1978.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 55 Ohio St. 2d 257 (1978), and is printed in the Appendix, *infra*, A2. The memorandum opinion of the Court of Appeals of the Eleventh Appellate District of Ohio is unreported and is printed in the Appendix, *infra*, A7.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on August 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does the Fourteenth Amendment prohibit proving one element of an offense by means of a presumption based upon proof of other elements of the offense?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code, Section 2903.01(B):

> "No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape."

STATEMENT OF CASE

Petitioner seeks to have this Court review on Fourteenth Amendment grounds a divided decision of the Supreme Court of Ohio entered on August 16, 1978, sustaining a conviction for aggravated murder despite the fact that a necessary element of the offense, purpose to kill, was provided by presumption and was not independently proven.

The petitioner was arrested on December 13, 1975, and was charged with aggravated murder with a specification for the death penalty. The charge was stated in terms of a homicide committed during the course of an armed robbery.

An indictment was returned for the same offense as well as aggravated robbery and trial was commenced on March 9, 1976. On March 22, 1976, a guilty verdict was returned on both the charge of aggravated murder with the specification and on the charge of aggravated robbery. A mitigation hearing was subsequently held which resulted in the petitioner's being sentenced to consecutive terms of life imprisonment on the murder charge and seven to twenty-five years on the robbery conviction.[1] No issue has been raised at any time challenging the validity of the robbery conviction and the sole issue before the Supreme Court of Ohio and this Court pertains to the murder conviction.

During the trial, at the close of the state's case, the petitioner moved for a judgment of acquittal on the ground that there was no proof that the petitioner had a purpose to kill.[2] That motion was summarily denied.[3]

Regarding the element of purpose to kill, the trial court instructed the jury as follows:

> "It must be established in this case that at the time in question there was present in the mind of the

---

1. Journal Entry, A14 ("A" refers to items reprinted in the Appendix to this Petition. "Tr" refers to the trial transcript and is followed by an appropriate volume and page reference. "R" refers to items in the record filed with the Supreme Court of Ohio).

2. Tr., IV, 333.

3. Tr., IV, 343.

defendant and/or his accomplice a specific intention to cause the death of Joseph H. Bradshaw, Jr."[4]

That instruction permitted the jury to find the defendant guilty of murder upon proof that a purpose to kill existed only in the mind of the petitioner's accomplice.

After the verdict, the petitioner filed a written motion for a judgment of acquittal on the ground that there was no proof of a purpose to kill on the part of the petitioner and squarely challenging the method of supplying this element by presumption or inference.[5]

In denying this motion, the trial court made findings of fact which have been unchallenged by the state and which provide the factual context for all of the appellate proceedings below:

"Defendant correctly alleges that there was no evidence that he shot and killed Joe Bradshaw.[6]

* * *

There was no evidence presented at trial that this defendant purposely caused, incited, or encouraged the murder of Joe Bradshaw.[7]

* * *

The law, in a case such as this, imputes purpose to the defendant because of his knowledgeable [sic] and aware participation [in the armed Robbery]."[8]

The petitioner appealed to the Court of Appeals of Ohio urging *inter alia* that to presume the intent of the

4. Tr., IV, 390. Objection is shown at R. 74.

5. R. 78.

6. Opinion Re Motion for Acquittal, A17. (Hereafter "Acq. Op.")

7. *Id.*, A18.

8. *Id.*, A19.

principal offender against the accomplice was impermissible. After the briefs were filed in the Court of Appeals, the Supreme Court of Ohio decided *State v. Lockett*, 49 Ohio St. 2d 48 (1976), *rev'd on other grounds*, ... U.S. ....., 57 L. Ed. 2d 973 (1978), reaffirming prior Ohio law relied upon by the trial court which permitted the element of purpose to kill to be presumed by mere participation in an armed robbery. The Court of Appeals relied upon *Lockett*, *supra*, and affirmed the trial court.[9]

The petitioner appealed to the Supreme Court of Ohio urging that *Lockett*, a 4-3 decision, be re-examined and overruled in light of the intervening decision of this Court in *Patterson v. New York*, 432 U.S. 197 (1977). The Supreme Court of Ohio, after granting discretionary review, refused to consider the implications of *Patterson* and affirmed the petitioner's conviction.[10]

REASON FOR GRANTING THE WRIT

THE DECISION OF THE SUPREME COURT OF OHIO BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN MULLANEY V. WILBUR, 421 U.S. 684 (1975) AS APPLIED IN PATTERSON V. NEW YORK, 432 U.S. 197 (1977).

The Supreme Court of Ohio has failed to observe this Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Patterson v. New York*, 432 U.S. 197 (1977) by concluding that a key element in a murder prosecution, purpose to kill, may be established by a presumption. The decision below does not conflict with *Mullaney* on

9. Opinion of Ohio Court of Appeals, *infra*, A7, at A9, *et seq.*

10. *State v. Clark*, 55 Ohio St. 2d 257 (1978), A2.

any theoretical or general ground, but rather on the direct holding of that case:

> "Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."

Patterson, supra, 215.

The conviction of the petitioner was affirmed on the basis that it was proper to presume that element of purpose to kill against an accomplice on the mere fact that he had been a voluntary participant in an armed robbery.[11] Therefore, the element of purpose to kill was presumed from the element of participating in an armed robbery.[12] This presumption was made despite the fact that the trial judge made a specific finding of fact that the petitioner did not cause, encourage or incite the murder of the decedent.[13]

Although the appeal to the Ohio Supreme Court by this petitioner was entirely predicated on the inconsistency between prior Ohio law and this Court's decisions in *Mullaney* and *Patterson*, the court below did not mention either case in any way in its opinion. The Ohio court

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11. *Clark, supra,* 257. Ohio is not a common law felony murder state. The Ohio Supreme Court has consistently held that intent to kill is an element of aggravated murder that must be proven by the prosecution in a case involving armed robbery or certain other enumerated felonies. *State v. Lockett,* 49 Ohio St. 2d 48, 358 N.E.2d 1062 at 1070, and Ohio Revised Code Section 2903.01(B), *supra,* 2.

12. Ohio Revised Code Section 2903.01(B) provides: "No person shall purposely cause the death of another while committing or attempting to commit . . ., aggravated robbery or robbery, . . ."

13. Acq. op. A18.

merely reaffirmed its position enunciated in *State v. Lockett, supra,*[14] which held that purpose to kill must be presumed against an accomplice who participates in an armed robbery regardless of whether he actually aided in the homicide or even knew of it.[15]

Patterson, which had not been decided when *Lockett* was announced, was relied on by the petitioner in the court below for the proposition that it required that court to reconsider the sharply divided *Lockett* holding. In spite of this Court's intervening decision in *Patterson,* the Ohio Supreme Court reaffirmed *Lockett* with one less dissent than it had originally.

If the decision of the Ohio Supreme Court is to stand it can only be after a reconciliation by this Court with the clearly contrary holdings in *Mullaney* and *Patterson.* The Ohio court's decision in petitioner's case is in direct conflict with even the most restrictive reading of these cases and failure to grant certiorari would leave that conflict unexplained and other courts without guidance as to the implications *Patterson* creates regarding presumptions and the Fourteenth Amendment.

If this Court is not disposed to abandon the principles of *Patterson,* the writ should be granted and the judgment below summarily vacated or reversed.

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14. The syllabus of the Ohio Supreme Court in *State v. Clark,* A2, is an identical restatement of Syllabus 3 in *State v. Lockett, supra.* Under Ohio practice, the Supreme Court speaks only through its syllabus except for per curiam opinions. See *Beck v. Ohio,* 379 U.S. 89 (1964), at 93, n.2.

15. This holding of *State v. Lockett, supra,* was not presented to or decided by this court in *Lockett v. Ohio,* ..... U.S. ....., 57 L. Ed. 2d 973 (1978).

CONCLUSION

The Ohio Supreme Court has decided an issue of federal law in direct contradiction to this Court's holdings and has declined to reexamine its position in light of this Court's most recent affirmation on the same subject. The writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

JUDGMENT ENTRY OF THE OHIO SUPREME COURT

(Dated August 16, 1978)

No. 77-909

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellee,

vs.

JIMMY LEE CLARK,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY

This cause, here on appeal from the Court of Appeals for Lake County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

OPINION OF THE OHIO SUPREME COURT

(Decided August 16, 1978)

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellee,

vs.

JIMMY LEE CLARK,
Appellant.

Where the record in a prosecution for aggravated murder committed during the commission of an armed robbery established that the participants in the offense entered into a common design to commit the armed robbery by the use of force, violence and a deadly weapon and all the participants were aware that an inherently dangerous instrumentality was to be employed to accomplish the felonious purpose, a homicide occurring during the commission of the felony is a natural and probable consequence of the common plan which must be presumed to have been intended, and such evidence is sufficient to allow a jury to find a purposeful intent to kill. (Paragraph three of the syllabus in *State v. Lockett*, 49 Ohio St. 2d 48, approved and followed.)

APPEAL from the Court of Appeals for Lake County.

On the morning of December 7, 1975, appellant, Jimmy Lee Clark, and a companion, Willie Jones, drove from Cuyahoga County to a gas station located just off In-

terstate 90 in Lake County. Upon their arrival the two men entered the gas station and confronted the attendant, Joseph H. Bradshaw, who was sitting on a stool in the front office. When Jones produced a handgun, Bradshaw reached into his pocket and gave Jones his money. Appellant and Jones then ordered Bradshaw back into the bay area of the gas station, where Bradshaw was made to lie on the floor while his coin changer and wallet were removed. Thereafter, appellant went into a back room and removed some coins from a money box. Following this, Jones marched Bradshaw into the back room, from which appellant heard the sound of two gunshots as he was exiting the back room. Appellant and Jones then departed in their vehicle, and soon afterward Bradshaw was discovered lying dead, face down in the back room, with bullet wounds in the head and neck.

On December 31, 1975, the Lake County Grand Jury returned an indictment charging both appellant and Jones with one count of aggravated murder with a specification, and with one count of aggravated robbery. After a series of pre-trial motions appellant's trial began in March 9, 1976. The jury returned a verdict of guilty on all charges on March 22, 1976.

A mitigation hearing was held on May 19, 1976, at the close of which the court found that a mitigating circumstance had been established. Appellant was thereupon sentenced to life imprisonment on the first count and 7 to 25 years on the second count, with the two terms to run consecutively.

On appeal, the Court of Appeals affirmed the trial court's judgment.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

CELEBREZZE, *J.* Appellant does not deny that he aided and abetted an aggravated robbery, but contests his conviction for the crime of aggravated murder, with the specification that the crime was committed during the commission of an aggravated robbery.

In order to comprehend the foundation of appellant's argument three statutes must be examined, the first of which, R. C. 2903.01(B), is the aggravated murder statute under which appellant was charged as an aider and abettor. This section provides:

"No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape."

The second statute is the complicity section, R. C. 2923.03, which reads in pertinent part:

"(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

"* * *

"(2) Aid or abet another in committing the offense."

The third statute is R. C. 2901.22(A), which defines the culpable mental state of purpose, as follows:

"A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

In view of the above-quoted sections appellant contends that to convict him of the crime of aggravated murder with the particular specification, it was necessary for the state to prove that he possessed the specific intention to kill, and that specific intent to kill may not be presumed as being the natural, reasonable and probable consequence of engaging in an aggravated robbery.

Appellant's position is in direct opposition to the majority holding of this court in *State v. Lockett* (1976), 49 Ohio St. 2d 48, 58-62,* a case in which the facts were parallel to the facts in the cause at bar. Our examination of the record in the instant cause establishes that appellant participated in the planning and commission of the robbery, and also acquiesced in the employment of a deadly weapon to accomplish this crime. Under these circumstances appellant must have realized that the victim's life would be endangered by the manner and means of performing the act conspired, and accordingly, appellant is bound by the consequences naturally resulting from the furtherance of the conspiracy to commit the aggravated robbery. We therefore hold that the jury had before it sufficient evidence from which to find that appellant possessed a purposeful intent to kill.

The judgment of the Court of Appeals is hereby affirmed.

Judgment affirmed.

HERBERT, P. BROWN, SWEENEY and LOCHER, *JJ.*, concur.

O'NEILL, *C. J.*, and W. BROWN, *J.*, concur in the judgment with regard to the conviction for aggravated robbery. *State v. Lockett* (1976), 49 Ohio St. 2d 48.

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*This issue was not resolved by the United States Supreme Court in its decision involving *Lockett v. Ohio*, 46 U. S. L. W. 4981 (1978).

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Dated June 14, 1977)

Case No. 6-017

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF LAKE

STATE OF OHIO,
Appellee,

vs

JIMMIE LEE CLARK,
Appellant.

JUDGMENT ENTRY

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, of earlier date, which is incorporated herein by reference.

It is ordered that appellee recover of appellant the costs herein taxed.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this Entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ROBERT E. COOK
/s/ ALFRED E. DAHLING
/s/ EDWIN T. HOFSTETTER
Judges

OPINION OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Dated May 31, 1977)

Case No. 6-017

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
LAKE COUNTY

STATE OF OHIO,
Appellee,

vs

JIMMIE LEE CLARK,
Appellant.

OPINION

DAHLING, *J.*

This is an appeal from a judgment of the Court of Common Pleas of Lake County wherein after a trial by jury the defendant was found guilty of Aggravated Murder in violation of Section 2903.01 with specifications of ag-

gravated circumstances of Aggravated Robbery and the defendant was found guilty of Aggravated Robbery in violation of Section 2911.01. Defendant was sentenced to life imprisonment for Aggravated Murder and to seven to twenty-five years for Aggravated Robbery with the time to be served consecutively.

The defendant-appellant has presented the following Assignments of Error for review:

> "1. The trial court erred in overruling the defendant's motion to suppress evidence directed at the statements obtained at the Cleveland Police Station and the Willoughby Police Station.
>
> 2. The verdict is against the weight of the evidence and the judgment is contrary to law in that the evidence is insufficient to sustain the conviction of aggravated murder and the trial court erred in denying the appellant's motions for a judgment of acquittal.
>
> 3. The trial court erred in charging the jury on the law as it applies to complicity.
>
> 4. The trial court erred in denying the appellant's motion to dismiss the indictment for aggravated murder and the specification of an aggravating circumstance on the ground that the manner in which the penalty is determined pursuant to Revised Code Section 2929.03 has a chilling effect on the exercise of the right to trial by jury.
>
> 5. The trial court erred in denying appellant's motion to dismiss the specification of an aggravating circumstance and in denying appellant's motion for a judgment of acquittal on the ground that a specification of aggravated robbery is insufficient to charge a capital offense where the principal offense also is stated in terms of the same aggravated robbery."

These Assignments of Error are without merit.

The first Assignment of Error is that certain statements of the defendant given at the Cleveland Police Station and Willoughby Police Station should have been suppressed. This Assignment of Error is without merit as the Record discloses that appellant gave the statements voluntarily after having been advised of his rights. Appellant's willingness to give an oral statement but not a taped or written statement is attributable to his desire to bargain for a reduced charge.

The Brief of Mr. Gregory Sasse, Assistant Prosecuting Attorney, succinctly summarizes the appellant's motives and objectives in giving an oral statement:

> ". . . .
>
> Without actually knowing what rule he sought to invoke he had probably become aware of technicalities which he knew had freed obviously guilty men and which had rationales which made no sense to him, and he wanted to hold the option open that he could benefit from such rule. Who is to say that appellant was mistaken? He has succeeded in his every objective. His accomplice has been caught, the death penalty has been avoided, and he has a shot at overturning his conviction which is based entirely upon the fact that he refused to put his statement on tape or in writing. To be sure, he may have misunderstood the extent to which he weakened his bargaining position by the making of his oral statement and by the waiving of his right to counsel, but then nobody is perfect."

The second Assignment of Error is answered by *State v. Lockett*, 43 Ohio St.2d 48 (1976) Syllabus 3 and 4, which state as follows:

"3. Where the the record in a prosecution for aggravated murder committed during the commission of an armed robbery establishes that the participants in the offense entered into a common design to commit the armed robbery by the use of force, violence and a deadly weapon and all the participants were aware that an inherently dangerous instrumentality was to be employed to accomplish the felonious purpose, a homicide occurring during the commission of the felony is a natural and probable consequence of the common plan which must be presumed to have been intended, and such evidence is sufficient to allow a jury to find a purposeful intent to kill.

4. If a conspired robbery, and the manner of its accomplishment, would be reasonably likely to produce death, each person engaged in the common design to commit the robbery is guilty with the principal killer as an aider and abetter in the homicide although not actually present at the time of the homicide, and a purposeful intent to kill by the aider and abetter may be found to exist beyond a reasonable doubt under such circumstances."

The third Assignment of Error is similar to the second Assignment of Error except that it concerns the Trial Court's "instructions to the jury" as it pertains to complicity.

In addition to *State v. Lockett, supra,* see *State v. Doty,* 94 Ohio St. 258 (1916) whereih the Court stated:

"Where . . . [an] unlawful act was contemplated in the original conspiracy, although not identical with or similar to the criminal act charged, if the conspired unlawful act and the manner of its performance would be reasonably likely to produce death, each conspirator

is equally guilty with the principal offender, as an aider and abetter in the homicide, although such aider and abettor was neither present nor had knowledge of the physical killing or of the weapon used."

We are of the opinion *State v. Doty* is still good law and the Trial Court did not err in instructing the jury on complicity.

The fourth Assignment of Error is that the manner in which the penalty is determined in R.C. 2929.03 has a chilling effect on the exercise of the right to trial by jury. The appellant chose to have a jury trial and was sentenced to life so this Assignment of Error is not pertinent to the case sub judice. However, the Court in *State v. Bell,* 48 Ohio St.2d 270 (1976), responded to this issue in Paragraph 1 of the Syllabus:

"A defendant is not coerced or impelled to waive his constitutional right to a jury trial by R.C. 2909.03[C] [1], [2], and [E], under the provisions of which an offender who waives jury trial need persuade only one member of the three-judge panel at the mitigation hearing to avoid imposition of the death penalty."

Appellant's final (fifth) Assignment of Error complains that the indictment stated both the principal offense and the specification of an aggravated circumstance in terms of the same aggravated robbery. Appellant's Reply Brief makes the astute observation that the death penalty is not provided for the cold-blooded, lying-in-wait killing. It can be argued that the lying-in-wait killing is more heinous than an accomplice to an armed robbery murder as in the instant case.

Also, the appellant makes the following commentary to support this Assignment of Error:

"In this case and in every other indictment drawn like it there is no legal or logical possibility of a not guilty verdict on the specification since by the time the jury reached that question under R.C.2929.03[B] they would have already satisfied themselves beyond a reasonable doubt as to the factual issues presented by the specification. If the principal charge is robbery-murder and the specification is robbery-murder, based on the same robbery as here, by duplicating the same allegations and calling one a principal charge and one a specification, the prosecuting attorney has turned an offense that when written once is a life offense into a death offense by writing it twice.

It is undeniable that no possibility exists for an acquittal on the specification and that fact alone renders meaningless that part of the indictment.

What Ohio prosecutors have been unable to fathom apparently is that robbery-murder cases are no longer capital crimes all by themselves. The popular consensus is that Ohio has retained the death penalty for certain felony murders and that is not the fact."

The appellant was sentenced to life imprisonment so the Motion to Dismiss the specification of the aggravated circumstance was not prejudicial. In addition, we agree with the following summary from the Brief of Mr. Sasse:

"The crux of appellant's dissatisfaction lies with the fact that in his case the proof of one event, to-wit: the robbery, triggers two legal consequences, one regarding liability for murder and one regarding sentencing. Appellant is not *entitled*, as a matter of law, to two factual determinations because there

is no right to an equal opportunity to escape punishment for crimes which one has committed. There is nothing inherently unjust in the situation where one factual event brings about two legal results as regards criminal liability. For example, if a 17 year old and a 19 year old engage in petty theft, the 19 year old is also liable for contributing to the delinquency of a minor. Where the policy reasons appropriately fit the facts there is no injustice. A situation which would be unjust and arbitrary would be found if a lesser felony which is included in a homicide could be used via the felony-murder rule to elevate the homicide to the level of aggravated murder. However, such is not the case since the law requires that the elements of the felony differ from those elements which are included in the homicide charge for the felony-murder rule to apply.

In appellant's case no injustice has resulted from charging him with a specified aggravating circumstance of aggravated robbery when similar language was used in describing the principal charge.

The State of Ohio has followed the law and procedure as outlined and as intended by the legislature and should be required to do no more than that."

For the foregoing reasons the Assignments of Error of the appellant are found without merit and the judgment is affirmed.

JUDGE ALFRED E. DAHLING

COOK, *P. J.*,

HOFSTETTER, *J.*, Concur.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated May 20, 1976)

Case No. 75-CR-435

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

JIMMIE LEE CLARK,
Defendant.

JOURNAL ENTRY

This day, to-wit: May 19, 1976, came the Lake County Prosecuting Attorney, Paul H. Mitrovich, and R. Paul LaPlante, Assistant Prosecuting Attorney, on behalf of the State of Ohio, and the defendant, Jimmie Lee Clark, being in Court, and represented by counsel, Albert L. Purola, Esquire, and John W. Ours, Esquire, the defendant having been found "Guilty" by a jury on March 22, 1976, of Aggravated Murder, in violation of Section 2903.01 of the Ohio Revised Code, with one specification of aggravated circumstances, to-wit: Aggravated Robbery, in violation of Section 2911.01 of the Ohio Revised Code.

Thereafter the Court ordered a presentence report and psychiatric examination, which reports are on file. Copies of the reports have been furnished to the prosecutor and counsel for the defendant. The Court, on the request of the defendant, ordered the defendant to be examined

by a psychiatrist of the defendant's choosing. His testimony was brought forth at the mitigation hearing and a report of his findings was filed with the Court.

Upon consideration of the reports filed, testimony of Dr. Lantner, of the Lake County Psychiatric Clinic, and testimony of Dr. Resnick, and the arguments of counsel, the Court finds that mitigating circumstances listed in division (B) of Section 2929.04 of the Ohio Revised Code is established by a preponderance of the evidence.

It was developed by a preponderance that the defendant is mentally deficient and that this crime of murder was primarily produced by this deficiency. It was further established that this deficiency is without cure and that the defendant, if present in society, would, with probable certainty, engage in criminal activity.

The Court then asked the defendant if he had anything to say why judgment and sentence should not be pronounced against him and the defendant having nothing to say.

WHEREFORE, IT IS THE ORDER OF THIS COURT that the defendant, Jimmie Lee Clark, be sentenced to Life Imprisonment at the Southern Ohio Correctional Facility in Lucasville, Ohio, on the first count of the Indictment. IT IS FURTHER THE ORDER OF THIS COURT that the defendant, Jimmie Lee Clark, be sentenced to an indeterminate term of not less than Seven (7) nor more than Twenty-five (25) Years on the second count of the Indictment. Said sentence shall be served consecutive to the sentence imposed on the first count of the Indictment.

It is further ordered that the defendant pay the costs of this action, taxed at $....., for which execution is hereby awarded.

This order is imposed under and by virtue of Sections 2903.01 and 2911.01 of the Ohio Revised Code.

WHEREFORE, defendant was advised of his right to appeal and to do so without cost, his right to appointment of counsel if unable to obtain counsel, and his right to documents required in that appeal without cost, and his right to have notice of appeal timely filed on his behalf.

IT IS SO ORDERED.

JOSEPH E. O'NEILL
Judge

OPINION OF THE COMMON PLEAS COURT RE MOTION FOR ACQUITTAL

(Dated June 8, 1976)

Case No. 75-CR-435

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, LAKE COUNTY

STATE OF OHIO,
Plaintiff,

vs.

JIMMY LEE CLARK,
Defendant.

Hon. Joseph E. O'Neill, Judge
Seventh Appellate District,
sitting by assignment in the
Court of Common Pleas, Lake
County, Ohio.

Dated:

O'NEILL, *J.*

Upon his motion for acquittal, the defendant admits that the evidence adduced at trial was sufficient to establish that he was involved in the aggravated robbery which preceded the murder of the decedent, Joe Bradshaw. Defendant correctly alleges that there was no evidence that he shot and killed Joe Bradshaw. Defendant continues that the only conceivable justification for his conviction of aggravated murder must be found in the proposition

that he was guilty of complicity in the perpetration of the crime of aggravated murder. Defendant says that, in his trial, there was no proof nor evidence of his culpability in the death of Joe Bradshaw. In support thereof, defendant cites R. C. Section 2923.03(A):

> "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> "* * *
>
> "(2) Aid or abet another in committing the offense."

It goes without argument that an essential element of aggravated murder, as to this case, is that the defendant purposely caused the death of decedent. There was no evidence presented at trial that this defendant purposely caused, incited, or encouraged the murder of Joe Bradshaw. This contention of defendant is supported and adopted in the case of *State v. Palfy*, 11 Ohio App. 2d, page 146. That Court was considering the same question:

> "It is obvious that the appellant has stood trial on a charge of first degree murder by virtue of the provisions of the latter statute, and it is equally obvious that *evidence of a purpose to kill must appear to exist before a conviction of first degree murder can be sustained.*" (Emphasis added)

That Court went on to reason that there did not have to be an exactness found but rather that purpose could be found from responsibility for:

> "* * * results which are the natural, reasonable and probable consequences of his voluntary acts." (Page 146)

See also *State v. Swiger*, 5 Ohio St. 2d 151, at 157:

> "* * * and men are presumed by law to intend the reasonable and natural consequences of acts deliberately done."

This defendant deliberately engaged in a robbery knowing that his cohort was armed with a gun to be used in perpetrating the robbery. It takes no great intelligence nor research to conclude that a handgun will cause death. It has few other uses. When used forcefully, in a robbery, without a doubt, the purpose and consequence of its use, is death. It is very useful in the disposal of victims and witnesses. The defendant knew this. He expressed that his preferred method was to tie his victims up. The law, in a case such as this, imputes purpose to the defendant because of his knowledgeable and aware participation.

> "This feature of the criminal law is founded upon the basic principle that persons engaged in an unlawful enterprise are presumed to acquiesce in whatever may be reasonably necessary to accomplish the object of the conspiracy; and if, under the circumstances, it might be reasonably expected that life might be endangered by the manner or means of performing the unlawful criminal act conspired, each is bound by the consequences naturally or probably arising in its furtherance, and in case of death would be guilty of homicide." *State v. Doty*, 94 Ohio St. 258, 264.

The Supreme Court has specifically found "purpose" even though the defendant was not the trigger man and was not present when death resulted.

> "So, if those inside the house while attempting to consummate the robbery, and in furtherance of such conspiracy *purposely* kill the person they are attempting

to rob, while he is resisting such attempt, and such killing is the natural and probable consequence of the common purpose, the person outside, who is aiding and assisting is equally guilty as the one striking the fatal blow, though he did not, previous to such attempt agree to or assent to such killing." (Emphasis added). *Stephens v. The State*, 42 Ohio St. 150, syllabus two (1884).

The rationale appears at page 154:

"In other words, each is presumed to have intended to authorize the other to kill, if, in perpetrating the robbery, it became a necessary means to its consummation."

This defendant authorized his associate to purposely kill and must answer for his authorization.

The finite wording of the indictment is the question raised in the second portion of this motion for acquittal. The Court agrees that there is confusion. However, the Court is of the opinion that two important factors were present and resolved. Primarily, an indictment must be so worded that it charges a crime and that defendant recognizes the crime charged. This Court as well as all counsel was never apprehensive as to the crime charged, and defendant presented a very pointed defense to the crime of aggravated murder during perpetration of a robbery. There was no obvious confusion on the part of the jury, they knew or should have known the elements following instructions. The Court agrees that there is a redundant confusion in the statute, but finds that this confusion did not enter into nor deny the defendant a fair trial.

Motion for acquittal is overruled.

JOSEPH E. O'NEILL
Judge

Supreme Court, U. S.
FILED
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Supreme Court of the United States

October Term, 1978

No. 78-789

JIMMY LEE CLARK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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BRIEF IN OPPOSITION TO CERTIORARI

OPINION BELOW

Omitted pursuant to Rule 40(c)

JURISDICTIONAL STATEMENT

Omitted pursuant to Rule 40(c)

QUESTION PRESENTED

Does a state criminal statute which defines "purpose" alternatively as (1) "a specific intention to cause a certain result" or (2) "where the gist of the offense is a prohibition of conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature," thus allowing proof of the element of purpose by the *conduct* of the defendant, violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2901.22(A), Ohio Revised Code:

"A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

Section 2923.03(A), Ohio Revised Code:

"No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * * * *

(2) Aid or abet another in committing the offense;

* * * * *

(F) Whoever violates this section is guilty of complicity in the commission of the offense and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

STATEMENT OF THE CASE

On December 12, 1975, Jimmy Lee Clark and "Slick Willie" Jones marched into a freeway-interchange gas station in Willoughby, Ohio, robbed attendant Joseph Bradshaw, Jr. of all the money he had, and then shot him dead.

Both were charged with aggravated murder with one specification of aggravated robbery, which under the Ohio

statutory scheme at the time, required imposition of the death penalty upon conviction.

Clark told police, and said at his trial, that after the robbery was concluded, Brawshaw was marched into the back room, and forced to lie, spread-eagle, on the floor. Clark then turned and started to walk out of the room. As he left, he heard two shots.

Jones quickly joined Clark in the getaway car, where Clark noted that instead of shooting his victims, his preferred procedure was to simply tie them up. Jones uttered a profanity, and the two drove away.

Police later found Joseph Bradshaw's body where he had been executed, with bullet wounds in the back of his head and neck.

On March 22, 1976, Jimmy Lee Clark was found guilty as charged of aggravated murder with a specification of robbery. The trial judge found a mitigating circumstance in Clark's mental deficiency, and he was spared electrocution. Clark is now serving a life sentence for his crimes.

Petitioner herein has unsuccessfully urged the question presented in his petition at the trial level, in his appeal as of right, and in the discretionary appeal granted him by the Ohio Supreme Court.

At all levels, petitioner has alleged the absolute failure of the State of Ohio to prove he specifically intended to cause the death of Joseph Bradshaw, and that therefore the State of Ohio cannot convict him of murder.

Petitioner correctly notes, at Petition at 3, that the trial judge instructed the jury that the state bore the burden of showing he had a purposeful intent to cause the death of Joseph Bradshaw.

But what petitioner fails to note for this court are the instructions given to the jury regarding the crime of Complicity (at R. 391), and the statutory definition of the degree of purpose which must be shown to support a conviction (at R. 392).

Because both instructions accurately reflected the statutory definitions noted in the Additional Constitutional and Statutory Provisions Involved, *supra*, and discussed extensively herein, they will not be repeated here.

ARGUMENT

Petitioner's reliance on *Mullaney v. Wilbur*[1] and *Patterson v. New York*[2] is misplaced, as in neither case did this court reach a holding which requires setting aside Ohio's statutory scheme for defining crimes involving those who conspire to rob and kill.

Petitioner further ignores the well-established principle that this court will not regulate a state's criminal procedure on Fourteenth Amendment Due Process grounds unless such procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[3]

Any faint resemblance petitioner's argument has to a significant constitutional question evaporates upon analysis, and for three reasons.

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1. 421 U.S. 684 (1975).

2. 432 U.S. 197 (1977).

3. *Speiser v. Randall*, 357 U.S. 513 (1958); *Leland v. Oregon*, 343 U.S. 790 (1952); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

First, the facts in *Mullaney* and *Patterson*, upon which petitioner relies so heavily, are at significant variance with those herein.

Second, even if the holding in *Mullaney* went to the lengths petitioner desires, this court made it clear in *Patterson* that *Mullaney* cannot be construed as petitioner wishes.

And third, an examination of the Ohio statutory definition of crimes involving robbery-murder will show that petitioner has not been denied due process.

I

Petitioner suggests that *Mullaney* and *Patterson* prohibit the state from proving an element of a crime by means of a presumption based on proof of other elements of the crime, and that therefore his conviction for aggravated murder should be set aside because his accomplice's intent to kill their common victim was imputed to him by means of a statutory presumption.

Leaving until later a full discussion of why neither statutory presumptions nor imputations of intent are involved herein, it should be noted that *Mullaney* and *Patterson* do not hold what petitioner wishes they held.

Mullaney and *Patterson* deal, simply, with the extent to which a state may require a criminal defendant to prove affirmative defenses or mitigating factors to the crime charged. In both, the statutory scheme shifted an allegedly improper burden of proof to the defendant.

But petitioner herein was required to prove nothing as to his guilt or innocence at trial. All burden of proof as to that issue rested, as required by *In re Winship*[4] and

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4. 397 U.S. 358, 364 (1970).

applicable state law,[5] on the prosecution. No burden of proof of anything regarding guilt or innocence was ever shifted to petitioner during trial.

Such *was* the case in *Mullaney*, where Maine's statute required a defendant in a homicide case to prove the mitigating elements of manslaughter, a requirement rejected by this court as an impermissible shift of the burden of proof.

Such was also the case in *Patterson*, where this court specifically limited the scope of *Mullaney*, holding that New York's statutory scheme requiring the defendant to bear the burden of proof of affirmative defenses did not violate the Due Process Clause of the Fourteenth Amendment.

This case does not involve mitigating elements to murder. It does not involve affirmative defenses. It does not involve shifting of any burden of proof to petitioner. It therefore does not involve a denial of constitutional rights as discussed in *Mullaney* and *Patterson*, and it thus cannot be said that the Ohio Supreme Court decided a substantial constitutional question in a manner probably not in accordance with the applicable decisions of this court.

II

The question raised herein by petitioner has already been asked and answered in *Patterson*, at 432 U.S. 214, at note 15:

> There is some language in Mullaney that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting "the degree of criminal culpability." (Citations omitted.) It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine the legislative reform of our criminal justice system. (Citations omitted.) *This Court did not intend Mullaney to have such far-reaching effect.* (Emphasis added.)

5. Section 2901.05(A), Ohio Revised Code; *State v. Seliskar*, 35 Ohio St. 2d 95, 298 N.E.2d 582 (1973).

Petitioner's plea for a writ should therefore be dismissed as improvident.

III

It is urged by petitioner that the State of Ohio was able to prove he intended that Joseph Bradshaw be killed only by proving that accomplice "Slick Willie" Jones had such intent, and by imputing Jones' intent to him. Such was not the case.

In support of his assertion of imputation of intent, petitioner provides this court with an incomplete and therefore misleading review of the statutory definitions related to the crime of aggravated murder.

He correctly quotes Ohio Revised Code Section 2903.01 (B) as reading:

> No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated robbery or robbery . . . .

This is the classic felony murder rule, modified to limit the felonies which will constitute the aggravating

factor and requiring the state to prove a purposeful intent to kill.[6]

Petitioner ignores, however, two other sections of the Ohio Revised Code which form the basis for his conviction. An examination of those provisions will betray the weakness of petitioner's argument.

Section 2923.03 provides, in part:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> * * * * *
>
> (2) Aid or abet another in committing the offense;
>
> * * * * *
>
> (F) Whoever violates this section is guilty of complicity in the commission of the offense and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

When considered *in pari materia* with Section 2903.01 (B), the result is obvious: Whoever aids or abets another who causes death while attempting, committing, or fleeing from a robbery or aggravated robbery, shall be prosecuted and punished in the same manner as the principal offender.

---

6. The classic felony murder rule is contained in Ohio Revised Code Section 2903.04(A), Involuntary Manslaughter, which reads "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony."

Conviction of the crime of aggravated murder, or "purposeful felony murder" results in a penalty of life in prison. See *Lockett v. Ohio*, ... U.S. ....., 57 L. Ed. 2d 973 (1978). Involuntary Manslaughter is punishable by a term of 4-25 years in prison.

Petitioner was convicted of committing aggravated (armed) robbery and aiding or abetting a co-defendant who committed murder in the course of aggravated robbery. He points out that the element of "acting with the kind of culpability required to commit an offense" is not proven beyond a reasonable doubt when he is charged and prosecuted simply as one who aids or abets.

The operation of a final section of the Ohio Revised Code completes the statutory scheme in such an event. The kind of culpability required to be demonstrated in order to prove the crime of aggravated murder in Ohio is "purposely". And the Code defines "purposely" at Section 2901.22(A) as follows:

> "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of this nature."

There is no question that petitioner did not specifically intend that Joseph Bradshaw die. He preferred to tie his victims up. Yet, in light of the terms of Section 2901.22 (A), we cannot, as petitioner has done, stop our analysis here.

The gist of the prohibition against aiding and abetting another to commit aggravated murder in a robbery setting is a prohibition against engaging in a robbery in such a manner that a death will be caused during or after such robbery. If one specifically intends to engage in such a robbery, he specifically intends to engage in conduct prohibited by the gist of the applicable statutes.

Petitioner does not contend that he had no specific intent to engage in the aggravated robbery. He only

contends that such specific intent cannot, even via the "gist of the offense" clause of Section 2901.22(A), support a finding of specific intent to murder.

Assuming, *arguendo*, the truth of petitioner's contention, it becomes obvious that the specific intent required can be found by the making of a simple presumption, well founded in both common sense and authority so basic that it need not be cited here.

That presumption is simply that *one is presumed to intend the natural and probable consequences of his voluntary acts.*

Petitioner does not deny that he intended to rob Joseph Bradshaw. He does not deny that he intended to have a handgun be used as a means of coercion in that robbery.

As the trial judge stated in denying the motion for acquittal:[7]

> This defendant deliberately engaged in a robbery knowing that his cohort was armed with a gun to be used in perpetrating the robbery. It takes no great intelligence nor research to conclude that a handgun will cause death. It has few other uses. When used forcefully, in a robbery, without a doubt, the very purpose and consequence of its use, is death. It is very useful in the disposal of victims and witnesses. The defendant knew this. He expressed that his preferred method was to tie his victims up. The law, in a case such as this, imputes purpose to the defendant because of his knowledgeable and aware participation.

Thus, to find the defendant guilty of murder, the jury must have found that one natural and probable consequence of the use of a handgun in a robbery is the death of the victim; that the state proved beyond a reasonable doubt that the defendant specifically intended that a gun be used in the robbery and that he thereby intended the natural and probable consequences of that use; that the state proved beyond a reasonable doubt he specifically intended to engage in an offense the gist of which was prohibited by statute, and that he therefore had a specific intent to cause Joseph Bradshaw to die.

7. See Petition, at A19.

Such a course of logic is not prohibited by the Constitution. To hold that it would be prohibited would be to hold that a presumption basic to our criminal justice system is invalid; that further the felony murder rule denies due process, and that one may participate in the most heinous of crimes without liability as long as one does not actually pull the trigger.

The statutory scheme Ohio has adopted for defining crimes involving conspiracies to rob and kill therefore does not "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[8] Ohio's scheme is *based* upon such traditional and fundamental principles of justice.

Petitioner has therefore failed to provide any basis for this court to grant certiorari.

CONCLUSION

The State of Ohio submits that petitioner has failed to sustain his burden of establishing special and important reasons for granting the writ as required by Rule 19.

The question presented by petitioner, viewed in light of the true facts and law, does not involve a significant

8. See note 3, *supra*.

question of federal law which has not been, but should be, settled by this Court; nor has the Ohio Supreme Court in this instance decided a substantial federal question in a manner which probably conflicts with the applicable decisions of this court.

For all of the above reasons, this court should exercise sound discretion and deny certiorari herein.

Respectfully submitted,

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